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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES CALHOUN,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Petitioner received effective assistance of counsel at his capital sentencing hearing?

2. Whether the sentencing jury was properly instructed on weighing aggravating and mitigating circumstances?

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case set forth in the Petition as Statement of Proceedings and Statement of Facts at pages 3-5.

REASONS FOR DENYING THE WRIT

I.

AS PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING, AND AS THIS CASE INVOLVES NOTHING MORE THAN A STRAIGHT-FORWARD APPLICATION OF LAW PREVIOUSLY ESTABLISHED BY THIS COURT, THERE IS NO BASIS UPON WHICH TO GRANT FURTHER REVIEW.

Petitioner was represented at trial and sentencing by two highly qualified defense attorneys, who gave detailed

testimony concerning the representation of Petitioner at a lengthy post-conviction hearing. In considering that testimony in conjunction with the allegations raised, the post-conviction court noted in its decision denying relief on this basis:

> "In no way can it be said that Petitioner was denied the proper functioning of the adversarial process. Just the opposite -- a full reading of the trial record here discloses that Petitioner was the beneficiary of a fully dedicated effort by two superbly skilled trial attorneys raising on his behalf numerous difficult issues for adjudication and preservation on appeal. The State, itself represented by outstandingly skilled prosecutors, found its case continually tested by equally adept adversaries. In cross-examination alone there are frequent examples of hard-hitting textbook type interrogations using known facts skillfully to test a witness' knowledge, reliability, bias and truthfulness.
>
> There was no failure of the adversarial process here. This was a full scale battle joined. The trial judge, showing great skill and patience, was repeatedly met with novel and complex, not to mention difficult, issues. The extent of the battle joined and the commitment of Petitioner's counsel is exemplified by the fact that Petitioner's counsel politely but firmly informed the trial judge and the State that they would incur possible contempt proceedings rather than participate in a trial if the Petitioner was to be chained in leg irons in the courtroom." (E. 69-70).
>
> * * *
>
> "One further comment with respect to the claim of ineffective assistance of counsel. One may ask how the judge, the prosecutors and the defense counsel failed to catch the matter of Audrey Neeley's grand jury testimony and the separate matter of allocution by the Petitioner.

> The answer lies not in a conclusion that there was no battle of effective adversaries. Rather, the answer is probably to be found in the broad sweep of the battle over many fronts during a period of time sufficient to tax and expend the energies of the participants, all of whom were dedicated to giving their best. The record so reflects." (E. 82-83).

In Strickland v. Washington, 466 U.S. 608, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-93 (1984), this Court stated:

> "In giving meaning to the requirement, however, we must take its purpose -- to ensure a fair trial -- as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> * * *
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

A review of the contentions raised by Calhoun fails to reflect that type of deficiency necessary to give rise to a valid Sixth Amendment claim. An examination of the alleged failure to investigate and failure to advise Calhoun of his right to allocute reveals that Petitioner's ineffective assistance claim was properly denied.

The facts in this case do not evidence any substantial failure to inquire into Calhoun's personal history by his attorneys. Indeed, most of the defense strategy at sentencing was centered upon the testimony of Petitioner's aunt, Lulu Cordell. At an early age, Calhoun was abandoned by his

parents, and instead was raised by this aunt. She was prepared to testify at sentencing with respect to Calhoun's background, upbringing, and miserable early homelife. Unfortunately, prior to her testimony, the aunt was hospitalized. Nevertheless, defense counsel arranged to have the jury transported to the hospital in order to receive testimony from this vital witness. However, Calhoun personally preempted this course of conduct by demanding that his aunt not be disturbed. Despite this lack of live testimony caused by Calhoun himself, the information was conveyed to the jury through the aunt's lengthy statement which was read. See E. 1208-1226. After its reading, the statement was submitted to the jury as an exhibit. While defense counsel may not have interviewed other members of Calhoun's family, defense counsel were certainly knowledgeable about Calhoun's background and conveyed that information to the jury which found as the only mitigating circumstance:

> "This jury feels that a substantial mitigating factor is the defendant's background which has been such that he has not been integrated into society. Therefore he has been and is unable to conform with its norms and moral values." (E. 1266).

Thus, it is clear that Petitioner's background was before the jury. Petitioner, however, complains that additional witnesses should have been utilized to more fully invigorate his personal history. Such a claim was properly rejected by the post-conviction court in its opinion:

> "Petitioner's mother, sister and aunt attended the trial. Petitioner's mother and sister could have been called as witnesses had Petitioner wished them to be called. . . . However, neither had much contact with Petitioner in his teen years and thereafter. In his teen years Petitioner was assisted by his Aunt Lulu Cordell but he did not then live with either his mother, Edna Calhoun, or his sister, Phyllis Calhoun. The mother and the aunt could have testified to the abuse Petitioner received as a child. In view of the attendance and presence of both at the trial, the conclusion reached here is that neither Petitioner nor Petitioner's trial counsel thought that the mother or the sister would be a helpful witness, if called. During these post-conviction proceedings, the sister proved to be a mediocre witness with respect to her personality but an impressive witness as to early child events suffered by her and Petitioner. As a witness, the mother's personality is substantially less than mediocre. However, she too testified to important facts concerning Petitioner tending to establish both deprivation and abuse. Trial counsel might well have called the sister and the mother as witnesses trusting that the factual information would be significant and that the personality deficiencies would inure ultimately to the benefit not the detriment of Petitioner. These, though, were tactical decisions to be made in consult with Petitioner, and the failure to call the mother or the sister or both cannot be called erroneous and falls far short of ineffective assistance." (E. 66-67).

The additional witnesses that Calhoun asserted should have been called at the sentencing hearing related to individuals who had known Calhoun while attending a human behavior course in 1977-78 and while participating as a program leader in a tennis program in the spring of 1979. Their testimony offered at post-conviction was characterized by the post-conviction judge as "limited and sketchy." (E.

65). In the words of the post-conviction judge, the testimonial "value at Petitioner's sentencing is so negligible that it could not be considered as a factor affecting the outcome of the sentencing." (E. 66). A review of the testimony of these witnesses at post-conviction supports the post-conviction court's conclusion. As a result, relief was properly denied on this basis.

In addition to the alleged failure to investigate and produce sufficient evidence in mitigation, Calhoun claims that his Sixth Amendment right to effective assistance of counsel was violated by the failure of his attorney to advise him of his right to allocute. However, in view of the fact that the right to allocute was open to question at the time of the trial, the failure in this regard cannot be said to fall below the range of competency demanded of attorneys in criminal cases.

At the time of Calhoun's sentencing, the right of a convicted defendant to make an unsworn statement, not subject to cross-examination, to the sentencer in a non-capital case was specifically set forth in the Maryland Rules of Procedure as former Maryland Rule 772. There was no concomitant right under Maryland Rule 772A, the procedures applicable to capital sentencing proceedings. Appellant recognizes this omission in the rules, but claims that counsel should have known that capital defendants were guaranteed the right to allocute under the Maryland common law. In Harris v. State, 306 Md. 344, 509 A.2d 120 (1986), the Maryland Court of Appeals acknowledged

the omission of a right to allocute from the capital sentencing rule, but held that there was nevertheless a common law right. However, in this case, the Maryland Court of Appeals acknowledged that this right had not been recognized prior to Harris:

> "As Harris indicates and as we have already said in Part I(B) of this opinion, there was a hiatus in our rules on the subject of allocution in capital cases between January 1, 1979, and July 1, 1984. The Maryland rules just did not afford defendants in capital cases a right of allocution. It was the common law right of allocution which was in effect at the time of sentencing in this case. None of our cases so held until Harris was decided on May 23 of this year. Defense counsel was not obliged to anticipate our holding in Harris." State v. Calhoun, 306 Md. 692, 736, 511 A.2d 461, 483 (1986).

Nevertheless Appellant asserts that counsel should have been informed of the common law right of allocution recognized in Dutton v. State, 123 Md. 373, 91 A. 417 (1914). However, a review of Dutton does not reflect that the common law "right" recognized in Harris was synonomous with the right to make an unsworn plea for mercy. In Dutton, supra, the Maryland Court of Appeals noted that the practice of allocution is not inherent, but rather is controlled by statute and that the purposes of allocution are accomplished in this State through the appointment of an attorney to defend the accused in a capital case and the existence of various motions that may be made on behalf of the accused to preclude the entry of judgment.

As recognized by the Connecticut Supreme Court in State v. Carr, 374 A.2d 1107, 1116 (1977), under the common law the purpose of allocution was not to present mitigating evidence or a plea for leniency, but rather was to give the defendant a formal opportunity to show one of the strictly defined legal grounds for avoidance or delay of the sentence. Other procedural devices, and indeed the entire mechanism embodied in Article 27, §413 (the Maryland death penalty statute), afforded the defendant ample opportunity to inject legal grounds for avoidance of the sentence. As a result, prior to the Harris decision, it was reasonable to believe that the sentencing hearing itself constituted a substitute for this common law version of allocution.

Certainly the law was not so clear at the time of Calhoun's sentencing hearing that defense counsel was ineffective for considering only whether Calhoun should testify and not whether he had the right to "allocute" in order to avoid cross-examination.

II.

AS THE SENTENCING JURY WAS PROPERLY INSTRUCTED ON THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, REVIEW BY THIS COURT SHOULD BE DENIED.

Claiming that the jury instructions given at sentencing erroneously placed the risk of non-production on the defendant in the ultimate weighing of aggravating and mitigating factors, and claiming that, at least, there was inconsistency in the instructions. Calhoun asserts that he is entitled to have his death sentence vacated on this basis. However, there

was neither an erroneous allocation of burden or inconsistency in instructions. As a result, there is no basis for the review.

Prior to the jury deliberating its sentencing verdict, the trial court instructed, in pertinent part:

> "Your determination is either a sentence of death or life imprisonment. The death sentence may not be imposed unless you unanimously agree that the aggravating factors outweigh the mitigating factors." (E. 1228).
>
> * * *
>
> "If you find that the mitigating factors outweigh the aggravating factors, then you go to the fourth section and enter life imprisonment. If you find that the mitigating factors do not by a preponderance of the evidence outweigh the aggravating factors, then you mark that accordingly and proceed to section four and enter a sentence of death." (E. 1233).

Contrary to the assertion of Petitioner, these instructions are not inconsistent. If aggravating circumstances outweigh mitigating circumstances (or mitigating circumstances do not outweigh aggravating circumstances), the sentence is death. On the other hand, if mitigating circumstances outweigh aggravating circumstances (or aggravating circumstances do not outweigh mitigating circumstances) then the sentence is life. There is no inconsistency; there is an omission: The instructions given only relate to situations where the scales are tipped to one side or the other and do not address the "equipoise" situation of even balance, and that is the only situation in which the "burden" is relevant. See Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), cert.

denied, ___ U.S. ___, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986). However, no instruction was requested on who bore the risk of non-persuasion, and no exception was taken to the omission of such an instruction.

Had an instruction been requested placing the risk of non-persuasion on the State, it would have been incumbent upon the trial judge to so instruct the jury. See Foster, et al. v. State, 305 Md. 306, 503 A.2d 1326 (1986) (on motions for reconsideration). Contrary to Petitioner's assertion, and regardless of his personal reading of the statute, the risk of non-persuasion has been squarely on the shoulders of the State since Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830, 848-849 (1980), the first decision rendered under the current capital punishment statute.

However, Petitioner's current allegation is not based upon the omission of an instruction on equipoise. Instead, he perceives inconsistency and a misallocation of the ultimate burden. Such is simply not the case, and review should be denied.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 1987, to Robert E. Morin, Esquire, Office of the Public Defender, Suite 250, 414 Hungerford Drive, Rockville, Maryland 20850.

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